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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 91-58
	)	
Amendment of Section 73.202(b)	)	RM-7419
Table of Allotments	)	
FM Broadcast Stations	)	RM-7797
(Caldwell, Texas, et al)	)	RM-7798

To: The Commission

OPPOSITION TO BRYAN BROADCASTING MOTION TO CONSIDER COMMENTS

On April 9, 1999, the Commission released a letter in this proceeding inviting final Comments and Reply Comments on April 29, 1999 and May 14,1999, respectively. The filings were optional, not required, but the Commission included an explicit condition at paragraph 5 that provided that if any such pleadings were in fact filed by anyone, they were required to be served upon opposing counsel. This was also consistent with the general requirement of Section 1.420 of the Commission's rules which always requires such service.

On April 29, Comments were filed by Roy E. Henderson ("Henderson") and served upon Bryan Broadcasting License Subsidiary ("Bryan") as required. Comments were also filed by KRTS,Inc, a non-party to the proceeding, which included a Certificate of Service showing service on Counsel for Henderson and Counsel for Bryan. No Comments were ever received from Bryan and in Henderson's Reply Comments, he indicated that fact and suggested that if Comments had in fact been filed by Bryan

without proper service as required, that such Comments would be fatally defective and should be rejected without further consideration in this proceeding.

On May 18, 1999, Henderson received a "Motion to Consider Comments of Bryan Broadcasting License Subsidiary, Inc" which essentially acknowledged that it had filed Comments with the Commission without bothering to serve opposing counsel. Not just late, not at all. Bryan argued that the failure to serve opposing counsel was simply an "inadvertent error...[and]...a regrettable omission" not discovered until Reply Findings had been filed and reference made to the fact that no Comments had been received from Bryan. Bryan suggested that this failure should be overlooked since it had served Henderson with prior pleadings during the course of the case, that in a different proceeding an Order to Show Cause had been accepted despite improper service, and that this could all be easily fixed by Bryan's magnanimous agreement to allow Henderson "an additional two weeks from the date of [Bryan's] filing to respond to the merits of [Bryan's] April 29 Comments, and [Bryan] consents to such extension". There are several things wrong with Bryan's plan and we will discuss them below.

In the first place, Bryan seems to give no weight to the fact that service of any Comments was not just required by Rule 1.420, but was underscored in this particular case by the Commission as it added a specific paragraph requiring that service on any Comments filed. It was not casual. Bryan was under

no obligation to file anything but if it chose to do so, it was required to do it in accordance with FCC Rules and the service requirement stated in those rules and as explicitly restated in the Commission's letter.

It is also worth noting that in paragraph 4 of the Commission's letter, the Commission recognized the length of this proceeding and stated that

> in the interest of administrative finality, no information submitted by a party concerning its proposal following the comment period will be deemed of decisional significance.

That would seem to indicate that pleadings on this case should have ended with Reply Comments and that the instant request for special consideration by Bryan itself falls outside that acceptable time period.

As to Bryan's suggestion that the fact it had been a participant in this proceeding for a long time and had in fact served prior pleadings in this case, should be considered an argument in its favor, we think it is just the opposite. Bryan knew this was a vigorously contested adversary proceeding. Even without the rule and without the FCC's specific reminder, there should have been no question that any pleading filed in this case had to be served on the opposing party. In fact, failure to do so would in itself constitute an unacceptable ex parte contact. In addition, we cannot ignore the fact that Bryan received service on Comments not just from Henderson but also from KRTS. Is it unreasonable to think that this alone should have been sufficient

to alert someone that any Comments filed by Bryan should also be served?

As to Bryan's consent to allow Henderson an "additional two weeks" from the date of Bryan's Motion in which to file a Reply to the defective filing, that appears to us to be more than a bit presumptuous on Bryan's part. Isn't it somewhat arrogant for Bryan, the party that failed to follow the rules, to presume to set such a schedule from the date of filing its own Motion, simply assuming that the Commission will grant the Motion, and accept the defective pleading, with Bryan already setting its own pleading schedule for the other party. We think so.

A cursory examination of the Bryan Comments also discloses that the main point advanced there was Bryan's new suggestion that the whole case has now been changed and 'made o.k. again' by Bryan filing yet another change to now propose another "new site" for the FCC to consider, this well over two years after filing its first January 21, 1997, "confusion" application, almost two years after the July 15, 1997, "we really meant this" application, more than one year after receiving a construction permit for the "we really meant this" site, one year and seven months after Henderson filed his Second Supplement calling Bryan's specific attention to the 73.315(a) deficiencies of Bryan's "we really meant this" site, nine months after the Commission decided this case without considering the matters raised in the Second Supplement, and more than a month after this case was remanded by the U.S. court of Appeals on the specific

question of comparing the Bryan site and its admitted substantial violation of 73.315(a) as compared to Henderson's arguable de minimis violation of the same rule. With this 11th hour attempt to change the facts of the case, Bryan simply suggests that the Commission should just proceed to recognize this latest proposed change and that everything is now just "moot". We don't think so.

For the reasons already stated in Henderson's Reply Comments as well as his Informal Objections filed against the April 19, 1999, application to change site by Bryan, Henderson suggests that it would be improper and inequitable, to say the least, for the Commission to now recognize the new last-minute attempted change of facts by Bryan and that for all purposes of this comparative rulemaking, the facts should remain as before the Commission at the time of Henderson's Second Supplement and the Commission's July, 1998, Decision in the case.1/ That being so, the main point of Bryan's Comments, that it has once more undergone a convenient metamorphoses tailored to the new "makeover" image that it seeks to present to the Commission, is one that it should be estopped from advancing at this stage of the proceeding, an argument that cannot in any event be recognized for any purpose in this case and is itself therefore "moot" and meaningless. The Comments would seem to be similarly

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1/ In addition to the clear equitable reasons for this, it is also noted that Bryan's new application is just that, a new application that could be withdrawn, modified, denied, dismissed, or set for hearing, nothing more than a remote, speculative, and desperate last gasp by Bryan to try to change its position and avoid the consequences of its own actions.

absent of any substantive merit and unnecessary to a final Decision in this case, containing arguments that have been previously made and rejected in this case.

In addition, we must also note here the existence of a second major problem for Bryan, that being the continuing lack of any credible explanation of its sham application of January 21, 1997. From the time it was caught on that, it has refused to even try to explain its actions other than to say it was "confusion". Finally, it has now suggested that it was just a "simple mistake in coordinates", conveniently omitting, inter alia, the difference between building a new tower at rule compliant site 1, versus simply placing its antenna on non-rule compliant site 2, or its false claim of FAA notification in the sham application. Quite a bit more than a simple "mistake in coordinates". Like some kind of administrative tar baby, even this tentative little offering by Bryan on the subject of the sham application just makes it more profoundly unbelievable. There is no new application that can be filed that can make this particular problem "moot". The deception remains as patent as it is unexplained.

For the reasons stated above, Henderson submits that there has been no good cause shown by Bryan to allow it an exception to the Commission's rules and to the Commission's explicit requirement in paragraph 5 of its Letter of April 9, 1999, and Henderson does not believe such an exception should be granted. Nonetheless, it is the Commission's decision to make and should

the Commission rule otherwise and grant this special consideration to Bryan, Henderson would expect that any such decision would contain a full 15 day time period for Henderson to prepare and file Supplemental Reply Comments directed to Bryan's Comments. Henderson should not be penalized for Bryan's violation of the Commission's rules.

Wherefore, Henderson submits that Bryan has not shown any basis for special consideration in this matter, that its Comments were fatally defective and should be stricken without further consideration in this case, that the Commission has all the facts necessary to go forward to issue a new Decision in this case, that it should proceed to do so based upon full consideration of those facts as they existed at the time of its last such decision, and that based upon those facts, the Henderson proposal should be adopted and the Bryan proposal denied.

Respectfully Submitted,

ROY E. HENDERSON

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May 25, 1999

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing OPPOSITION TO BRYAN BROADCASTING MOTION TO CONSIDER COMMENTS have been served by United States mail, postage prepaid this 25th day of May, 1999, upon the following:

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